

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

MEMC ELECTRONIC MATERIALS, INC.

Employer-Petitioner

and

INTERNATIONAL ASSOCIATION OF MACHINISTS & AEROSPACE WORKERS, AFL-CIO

Petitioner-Union

Cases 14-RC-12363 and 14-RM-730

**REGIONAL DIRECTOR'S
DECISION AND DIRECTION OF ELECTION**

Upon petitions duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.^{1/}
2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
3. The labor organization involved claims to represent certain employees of the Employer.
4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
5. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:^{2/}

All full-time and regular part-time production employees employed by the Employer at its St. Peters, Missouri facility, EXCLUDING maintenance employees, temporary employees,^{3/} office clerical and professional employees, guards, supervisors as defined in the Act, and all other employees.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking

employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

International Association of Machinists & Aerospace Workers, AFL-CIO

ELECTION NOTICES

In accordance with Section 102.30 of the Board's Rules and Regulations, the Employer shall post copies of the Board's official Notice of Election in conspicuous places at least 3 full working days prior to 12:01 a.m. of the day of the election. These notices are to remain posted until the end of the election. Failure to post the election notices as required will be grounds for setting aside the election whenever proper and timely objections are filed. A party is estopped from objecting to nonposting of notices if it is responsible for the nonposting. An employer shall be conclusively deemed to have received copies of the election notice for posting unless it notifies the Regional Office at least 5 working days prior to the commencement of the election that it has not received copies of the election notice. As used in this paragraph, the term "working day" means an entire 24-hour period excluding Saturdays, Sundays, and holidays.

LIST OF VOTERS

In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB. v. Wyman-Gordon Co.*, 394 U.S. 759 (1969) Accordingly, it is hereby directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director for Region 14 within 7 days of the date of this Decision and Direction of Election. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994) The list must be of sufficiently large type to be clearly legible. I shall, in turn, make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at 1222 Spruce Street, Room 8.302, Saint Louis, Missouri, on or before **July 5, 2002**. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission. Since the list is to be made available to all parties to the election, please furnish a total of **2** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. To speed preliminary checking and the voting process itself, the names should be alphabetized (overall or by department, etc.). If you have any questions, please contact the Regional Office.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **July 12, 2002**.

Dated June 28, 2002

at Saint Louis, Missouri

Ralph R. Tremain, Regional Director, Region 14

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- 1 The Employer, MEMC Electronic Materials, Inc., a Delaware corporation, with its principal offices and a manufacturing facility in St. Peters, Missouri, the only facility involved here, is engaged in the manufacture, distribution, and non-retail sale of silicon wafers.
 - 2 In Case 14-RC-12363, filed May 31, 2002, the Union seeks an election in a unit consisting of the Employer's production employees. In Case 14-RM-730, filed June 4, 2002, the Employer seeks an election in a larger unit consisting of all production and maintenance employees. The Union previously petitioned for a separate unit of the maintenance employees in Case 14-RC-12348, filed on April 23, 2002. On May 3, the Employer and the Union entered into a stipulated election agreement in Case 14-RC-12348, providing for an election to be held on June 5 and 6 in a unit of the maintenance employees and excluding the production employees. On June 4, after the petitions were filed in the instant cases, the Employer filed a motion to postpone the election in Case 14-RC-12348, consolidate the cases, and set aside the stipulated election agreement. The Acting Regional Director denied that motion by order dated June 6, the election was conducted pursuant to the stipulated election agreement, and the ballots were impounded. The ballots were opened and counted on June 10, despite the Employer's request for an emergency stay, and a majority of votes were cast for the Union. The Employer has filed timely objections to the conduct of the election. In the instant cases, the Employer continues to assert that the stipulated election agreement in Case 14-RC-12348 should be set aside and an election conducted in a unit of all production and maintenance employees. The Employer argues that, despite its stipulation to the contrary, only the overall unit of production and maintenance employees is appropriate as these employees share an overwhelming community of interest. The Union contends that the separate production unit is appropriate because the Employer is bound by its stipulation that the separate maintenance unit is appropriate and, therefore, community of interest is irrelevant. I find that the Employer is bound by its stipulation in Case 14-RC-12348 and that a unit including production employees and excluding maintenance employees is appropriate.

The Employer's facility in St. Peters, Missouri covers approximately 196 acres and contains numerous structures and buildings, 12 of which house the maintenance, manufacturing, shipping, and plant upkeep operations. The Employer produces silicon wafers of various sizes for use in semiconductor devices and similar electronic devices. The production process is ongoing 7 days a week, 24 hours per day. The silicon wafers are produced through intricate, automated processes by production employees who are called Operator Team Technicians (OTT). The OTTs work in different departments and buildings which house the various stages of the production process. The production process includes growing silicon crystals, crystal pulling, slicing of silicon into wafers, crystal fabricating, cleaning, lapping, polishing and, ultimately, the shipping of the finished product. There are approximately 600 employees classified as OTTs or production employees.

The Employer also employs 116 maintenance employees, who are called Maintenance Team Technicians (MTT). Maintenance employees are classified as either Mechanical Maintenance Technicians (MMT) or Electrical Maintenance Technicians (EMT). The Employer does not have a central maintenance shop for maintenance employees, rather maintenance employees are assigned to maintenance shops which are adjacent to each production department. For example, 24 maintenance employees are assigned to Crystal Pulling, 22 to EPI, and 28 to polishing. The maintenance shops are separate rooms with a card-swipe lock which restricts access. The shops contain tool boxes, workbenches, parts storage, and a specialized maintenance computer system. Maintenance employees repair, service, and troubleshoot production equipment in their assigned area. Some work is performed on the production floor, some in the shop. At the start of their shift, maintenance employees report to their assigned shop, where they meet with maintenance employees from the previous shift and check the computer for further assignments. When production equipment malfunctions or needs repair, production supervisors enter that information into the computer system. Maintenance supervisors also enter work assignments into this system. Production employees communicate with maintenance employees working on their equipment, giving information to assist in troubleshooting and feedback on the performance of equipment. There are some routine maintenance-type tasks, such as changing gas cylinders, scrubbers, and quartz lamps, set up of EPI reactors, as well as periodic checks of safety showers and secondary containment systems, that in some production areas are performed by production employees and in other areas are performed by maintenance employees. The record does not reflect why this varies from area to area.

All maintenance operations are under the overall supervision of the maintenance operating supervisor, who also directs the two first-line maintenance supervisors. Some maintenance employees also work under the direction of the facilities supervisor. As all of the maintenance supervisors work the day shift and as maintenance employees are needed on all shifts, approximately 60 percent of the maintenance employees regularly work without a maintenance supervisor on duty. During these times, maintenance employees may receive instruction concerning maintenance priorities from the production supervisor in the applicable assigned area. Although there was conclusionary testimony that production supervisors have the authority to discipline maintenance employees, no evidence of exercise of that authority was presented. Maintenance supervisors and the facilities supervisor do not supervise production employees.

The qualifications and training for production and maintenance employees differ. The production employees must pass a basic reading comprehension and math test. The maintenance employees are required to have a 2-year degree or applicable industrial experience or 3 years applicable military experience. The maintenance employees are also required to take a written test and a hands-on test to demonstrate their mechanical and/or electrical knowledge and skill. Most employees working in the maintenance classification previously worked as production employees. Upon successful completion of the written and hands-on exams, production employees are placed, by seniority, in a pool of employees qualified to advance to work in the maintenance classification. When an opening occurs in maintenance, the Employer hires from its pool of pre-qualified production employees. All but one maintenance mechanic technician currently employed by the Employer previously worked in the production classification, and 43 of the

Employer's 64 electrical maintenance technicians previously worked as production employees. The maintenance employees are required to own certain tools, which cost approximately \$2600. They are required to pay 60 percent of this cost over a 3-year period. The production employees have no tool requirement and utilize only basic tools which are provided by the Employer.

Production and maintenance employees are hourly-paid employees. Maintenance employees earn up to \$21 an hour. Production wage rates range from \$11.82 to \$17 an hour. Production and maintenance employees otherwise enjoy the same fringe benefits and are subject to the same rules and policies, including plant-wide seniority. Employees laid off from maintenance, if their seniority allows, may transfer into an open production position and keep their maintenance wage level for up to 1 year. A maintenance employee on layoff may be recalled, based on seniority, to work in the production classification. A maintenance employee recalled to work in production is paid at the lower wage rate of the production classification but retains his plant seniority and recall rights to maintenance positions. About four maintenance employees are currently working in production classifications due to layoff.

Based on the parties' stipulated election agreement as well as community-of-interest factors, I find that the petitioned-for unit of production employees is appropriate. It is well established that once a stipulated election agreement has been approved, a party may withdraw therefrom only upon an affirmative showing of unusual circumstances or by agreement of the parties. The subsequent filing of a petition by the Union seeking a separate unit of employees who share a community of interest with the employees who are the subject of the stipulation is not sufficient to establish the requisite "unusual circumstances." *Hampton Inn & Suites*, 331 NLRB No. 238 (2000) As the Employer is bound by its stipulation, the community-of-interest issues are irrelevant even assuming that the maintenance and production employees share an overwhelming community of interest, and the Board would have included both groups in the same unit absent the stipulation. *Id.* Nevertheless, I find that the shared community of interest is not so substantial as to mandate the inclusion of the maintenance employees in the production unit. A labor organization need not seek the only or even the most appropriate unit but is required to seek only an appropriate unit. *Overnite Transportation Co.*, 322 NLRB 723 (1996); *Dezcon, Inc.*, 295 NLRB 109 (1989) The Employer's maintenance employees constitute a distinct and cohesive grouping of employees. The maintenance employees have a distinct classification system and receive significantly higher wages; they have specialized skills as evidenced by the hiring and tool requirements; their work is limited to maintenance and not functionally integrated into the production process; they report to maintenance shops; utilize a separate maintenance computer; and they are separately supervised. The record evidence that production supervisors supervise maintenance employees on off-shifts is limited to no more than routine identification of machines that need repair and the priority of repairs. There is no evidence that these supervisors provide direction or have disciplined or effectively recommended discipline of maintenance employees. In these circumstances, the evidence does not establish common supervision. *In re Yuengling Brewing Co. of Tampa, Inc.*, 333 NLRB No. 104 (2001); *Lawson Mardon U.S.A.*, 332 NLRB No. 122 (2000) Accordingly, I find that the petitioned-for unit of production employees is appropriate. *Lawson Mardon U.S.A.*, supra; *In re Sundor Brands, Inc.*, 334 NLRB No. 100 (2001); *Capri Sun*, 330 NLRB 1124

(2000) The cases relied on by the Employer are factually distinguishable and inapposite. Thus, *U.S. Plywood*, 174 NLRB 292 (1962) dealt with production and maintenance employees where there was prior bargaining history of a single unit in the plant, and in an industry with a history of plant-wide bargaining. *F & M Schaefer Co.*, 198 NLRB 323 (1972) involved production and maintenance employees with identical qualifications and production employees who routinely performed the very routine work of maintenance employees. *Monsanto Co.*, 172 NLRB 1461 (1978) involved maintenance employees whose duties were routine and required minimal skills such that production employees frequently substituted for maintenance employees. Also, in all three cases cited by the Employer, a considerable amount of maintenance work was subcontracted out because those maintenance employees were unqualified to do the work. No evidence of subcontracting was presented in this case.

The Employer contends that the utility operators should be excluded from the production unit found appropriate here because they share less of a community of interest with the production employees than they do with the maintenance employees. The Union has no position based on community-of-interest factors, but states that it has no objection to including the utility operators in the petitioned-for unit. The record establishes that the Employer employs seven utility operators, six of whom are assigned to the facilities maintenance department, which is responsible for the physical plant. One utility operator is assigned to a production department. The 6 utility operators assigned to facilities maintenance are supervised by the facilities supervisor, as are 16 maintenance employees who are also assigned to facilities maintenance. The record does not reflect who supervises the seventh utility operator, what his duties are, or what, if any, contact the utility operators have with production employees or their employment qualifications. Like the production and maintenance employees, the utility operators are hourly paid, their wage rate somewhere between that of production employees and maintenance employees. The utility operators and the production employees have the same fringe benefits and are subject to the same policies and rules and regulations. As the record does not establish whether or not the utility operators have any contact with the production employees, but does establish that they share similar wages and benefits and at least one work area, I find the record is insufficient to determine the unit placement of the utility operators. Accordingly, I shall permit the utility operators to vote pursuant to the Board's challenged ballot procedures.

At hearing, the Employer and the Union stipulated that the 10 production employees who have been laid off since April 2001 have no expectancy of recall and, therefore, should be excluded from the unit. Accordingly, I will exclude these employees from the unit found appropriate here.

- 3 At hearing, the Employer and the Union stipulated that the temporary employees employed by Adecco should be excluded from the unit as they do not share a community of interest with the production employees. Accordingly, I will exclude the temporary employees from the unit found appropriate here.

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